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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETER GATIEN, an individual;

Plaintiff,

vs.

STARWOOD HOTELS & RESORTS
WORLDWIDE, INC., a Maryland
Corporation; W HOTEL MANAGEMENT,
INC., a Delaware Corporation, and DOES 1-
10, inclusive.

Defendants.

Case No. 2:17-cv-01864
Assigned to the Hon. Cormac J. Carney
Complaint Filed: 3/08/17

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHOTRITIES IN
SUPPORT OF MOTION TO
TRANSFER VENUE TO THE
DISTRICT OF MASSACHUSETTS
PURSUANT TO 28 U.S.C. §1404(a)**

**[Filed concurrently with Notice of
Motion and Proposed Order]**

**Date: August 14, 2017
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STATEMENT OF ISSUES PRESENTED

1. Where the plaintiff is not a citizen or resident of California, the events relevant to plaintiff's intellectual property infringement claims are based on the actions of a nightclub and hotel in Boston, Massachusetts, the non-party witnesses are not within the trial subpoena power of this Court but are within the trial subpoena power of the District of Massachusetts, and all of the other witnesses and evidence likely to be relevant are located in Massachusetts, New York City and Maryland, should this Court transfer venue to the District of Massachusetts pursuant to its authority and discretion under 28 U.S.C. §1404(a)?

The Moving Defendants Answer: Yes.

I. INTRODUCTION

Plaintiff Peter Gatien (“Plaintiff” or “Mr. Gatien”) is an individual resident in New York City who, according to the allegations of his Complaint filed March 8, 2017, has been harmed by acts of trademark, trade dress and copyright infringement that occurred in connection with a nightclub operating on the premises of the W Boston Hotel in Boston Massachusetts. The Tunnel nightclub is independently owned and operated by a third party, wrongly named in the Complaint as Speakeasy Hospitality Group, Inc. (“Speakeasy”), which merely rents space as a tenant at the hotel. Although an analysis of the facts alleged in the Complaint show that the principal conduct claimed to be infringing was engaged in if at all by the Tunnel nightclub operator, Plaintiff Gatien voluntarily dismissed Speakeasy on June 12, 2017. The operator of the Tunnel nightclub is no longer a party to this action, but is in possession of much of the information relevant to the alleged infringement. Because a consideration of the venue transfer factors used in the Ninth Circuit clearly favor the transfer of this action to the District of Massachusetts, Defendants Starwood Hotels and Resorts Worldwide, Inc. and W Hotel Management, Inc. respectfully request that this Court exercise its discretion to transfer the action pursuant to 28 U.S.C. §1404(a).

II. ALLEGATIONS RELEVANT TO VENUE¹

Mr. Gatien owned and operated a New York City nightclub called “Tunnel” which was known to the public by a distinct logo (the “Logo”). Complaint, DN 1, ¶1. Mr. Gatien is a resident of New York City. DN 1, ¶11. Mr. Gatien refers to the Tunnel nightclub as the “Original Tunnel.” *Id.* The Original Tunnel was open in New York City

¹ The Hotel Defendants will be contesting many of the facts alleged in the Complaint as facts that relate if at all only to the nightclub operator, and not to the Hotel Defendants. For purposes of this motion only, the Hotel Defendants are treating the factual allegations of the Complaint as true, except as specifically addressed in the Declaration of Rob Hunter.

1 from 1986—2001. *Id.*, ¶14. During the operation of the Original Tunnel up until 2001, it
 2 used and became known to the public through the Tunnel name and the Logo. *Id.*

3 Defendants opened a nightclub at the W Hotel in Boston, using the Tunnel name
 4 and the Logo used by Plaintiff in connection with the Original Tunnel nightclub in New
 5 York City. *Id.*, ¶16. Specifically, the “Tunnel Boston” is operated by Defendant
 6 Speakeasy, which is a Massachusetts-based hospitality company operating numerous
 7 restaurants, bars and nightclubs in and around the Boston area. *Id.*, ¶10. Defendants also
 8 misappropriated the décor and overall look and feel of the Original Tunnel nightclub,
 9 referred to in the Complaint as the Tunnel Trade Dress. *Id.*, ¶18. Defendants’ use of the
 10 Tunnel name/trademark, the Logo and the Tunnel Trade Dress is unauthorized, and has
 11 caused damage to the Plaintiff. *Id.*, ¶19, 21-22. Defendants benefitted from the
 12 misappropriation and infringement, *id.* at ¶25, and damaged Plaintiff, *id.* at ¶28.
 13 Defendants improperly used the Tunnel name/trademark, the Logo and the Tunnel Trade
 14 Dress in advertising and marketing materials. *Id.*, ¶30.

15 Plaintiff’s First Claim for Relief is for violation of the federal Lanham Act
 16 governing trademark infringement and unfair competition. *Id.*, ¶29-43. Plaintiff alleges
 17 that Defendants’ use of the Tunnel name/trademark, the Tunnel Trade Dress and the Logo
 18 violate the Lanham Act. *Id.*, ¶30, 40-41. Plaintiff’s Second and Third Claims for Relief
 19 claim that the same acts briefly summarized above violate the California Business and
 20 Professions Code (Second Claim, *id.*, ¶44-51) and California’s Common Law of Unfair
 21 Competition (Third Claim, *id.*, ¶52-54). Plaintiff’s Fourth Claim for Relief alleges that
 22 the copying and use of the Logo constitutes an infringement of Plaintiff’s copyright
 23 protected by the U.S. Copyright Act. *Id.*, ¶55-61.

24 25 **III. LEGAL AUTHORITIES GOVERNING VENUE TRANSFER**

26 The venue transfer statute, 28 U.S.C. §1404(a), provides that “[f]or the convenience
 27 of parties and witnesses, in the interest of justice, a district court may transfer any civil
 28 action to any other district or division where it might have been brought or to any district

1 or division to which all parties have consented.” The plaintiff bears the burden of proving
2 that venue is appropriate. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491,
3 496 (9th Cir. 1979). The purpose of the venue transfer statute is to give defendants some
4 control over the choice of venue to protect them from having to defend lawsuits in a
5 remote and inconvenient forum. *Remley v. Lockheed Martin Corp.*, 2001 U.S. Dist.
6 LEXIS 7990, *9 (N.D. Cal. 2001). Thus, the focus of the venue transfer inquiry, as
7 articulated in the statute, is the convenience of the parties and witnesses and the interests
8 of justice, which are best served by having disputes heard in an appropriate forum with
9 legitimate contacts to the controversy.

10 The First Claim for Relief alleges that each and every infringing act constitutes a
11 violation of the federal Lanham Act. Venue in trademark cases is evaluated under the
12 general venue statute provisions of 28 U.S.C. §1391. *Adobe Systems, Inc. v. Blue Source*
13 *Group, Inc.*, 125 F.Supp.3d 945, 959 (N.D. Cal. 2015). Even if venue is proper, a district
14 court may exercise its discretion to transfer the case to a different venue for the
15 convenience of the parties and the witnesses and in the interest of justice. *California*
16 *Brewing co. v. 3 Daughters Brewing LLC*, U.S. Dist. LEXIS 52344, *19 (E.D. Cal. 2016).
17 Courts in the Ninth Circuit use a list of factors to decide venue transfer requests. *Jones v.*
18 *GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). The factors include the:

- 19 (1) location where the relevant agreements were negotiated and executed,
- 20 (2) state that is most familiar with the governing law,
- 21 (3) plaintiff's choice of forum,
- 22 (4) respective parties' contacts with the forum,
- 23 (5) contacts relating to the plaintiff's cause of action in the chosen forum,
- 24 (6) differences in the costs of litigation in the two forums,
- 25 (7) availability of compulsory process to compel attendance of unwilling non-party
- 26 witnesses,
- 27 (8) ease of access to sources of proof,
- 28 (9) presence of a forum selection clause in the contract of the parties, and

(10) relevant public policy of the forum state, if any, concerning the dispute.

Id. Applying the venue transfer factors in this case, it is clear that all of the relevant factors favor transfer to the District of Massachusetts.

IV. THIS SUIT COULD HAVE BEEN BROUGHT IN THE DISTRICT OF MASSACHUSETTS, WHICH HAS PERSONAL AND SUBJECT MATTER JURISDICTION, AND IN WHICH VENUE IS APPROPRIATE

The threshold inquiry in a transfer venue motion is whether the case could have been filed in the proposed transferee forum, the District of Massachusetts. As explained in more detail in the analysis of the venue transfer factors below, the District of Massachusetts is an appropriate forum with jurisdiction over the parties, venue is proper there, and Massachusetts has direct contacts with the dispute. The alleged acts of infringement all arise out of conduct at a nightclub in Boston operated in the same building as the W Boston Hotel. Thus the Hotel Defendants are susceptible to specific jurisdiction in the District of Massachusetts. Venue is proper there because “a substantial part of the events or omissions giving rise to the claim occurred” in the District of Massachusetts. *Remley v. Lockheed Martin Corp.*, *supra*, *9. In addition the substantial claims of the Complaint are allegations of infringement of federal intellectual property law over which the District of Massachusetts has subject matter jurisdiction. The District of Massachusetts is therefore an appropriate forum in which Plaintiff Gatien and his counsel could have filed this lawsuit in the first instance, but chose not to do so.

V. THE VENUE FACTORS FAVOR TRANSFER OF THIS CASE TO THE DISTRICT OF MASSACHUSETTS

1. The location where the relevant agreements were negotiated and executed

The Complaint does not allege the breach of any agreement between the parties. Unlike the franchise agreement at issue in *Jones v. GNC Franchising, Inc.*, there is no agreement between the parties, thus no forum selection clause at issue between the parties.

1 Because there is no agreement between the parties that underlies this dispute, there are
2 also no relevant contract negotiations that would affect the venue transfer analysis. (To
3 the extent that any other contract is relevant to this dispute, it would likely be the lease
4 between the hotel owner and the Boston Tunnel night club tenant, but that lease is for the
5 nightclub premises in Boston, Massachusetts, not California. Declaration of Rob Hunter
6 (“Hunter Decl.”), ¶3.

7 This factor is either neutral or favors transfer to the District of Massachusetts.
8

9 2. The state that is most familiar with the governing law

10 The principal claims of the Complaint arise under the federal intellectual property
11 laws of the United States. The First Claim for Relief states a claim for violation of the
12 Lanham Act and the Fourth Claim for Relief states a claim for violation of the U.S.
13 Copyright Act. These claims are within the exclusive jurisdiction of the District Courts as
14 claims arising under federal law, 28 U.S.C. §1331, and under the patent, copyright,
15 trademark and unfair competition jurisdiction of the federal courts, 28 U.S.C. §1338. DN
16 1, ¶5. The District of Massachusetts thus is equally familiar with the law governing the
17 principal claims asserted in the Complaint. To the extent that it is proper for an individual
18 residing in New York City who is not a California citizen to bring California state law
19 claims for activities based solely in Massachusetts, the Second and Third Claims for
20 Relief invoke the supplemental jurisdiction of the federal court under 28 U.S.C. §1367(a).
21 As supplemental legal claims, these should not be the focus of the venue transfer analysis,
22 although a federal court in California may be more familiar with these claims than the
23 District of Massachusetts.

24 This factor is neutral or may slightly favor venue in California.
25

26 3. The plaintiff's choice of forum

27 The plaintiff's choice of forum is usually entitled to some deference by a court
28 considering a transfer of venue under Section 1404(a). In this case Mr. Gatien is not

1 choosing his home forum, since he is a resident of New York City. Rather, Mr. Gatien is
2 choosing a forum 3,000 miles away from his home state, and an equal distance away from
3 the forum where the acts alleged to have infringed his rights took place.

4 A plaintiff's choice of his home forum is given more deference than his choice of
5 foreign forum to file his action. *Rubio v. Monsanto Co.*, 181 F.Supp.3d 746, 762 (C.D.
6 Cal. 2016). Plaintiff Rubio was exposed to Monsanto's Roundup weed-killer while
7 employed as an agricultural worker in Oregon, California and Texas and lived in Texas at
8 the time that he filed suit in California. *Id.*, p. 754-55. Although California "had some
9 ties to the controversy because some of Rubio's exposure to Roundup occurred in this
10 district," the Court found that Texas had more ties to the controversy and that this factor
11 weighed slightly in favor of granting Monsanto's motion to transfer the case to Texas. *Id.*,
12 p. 762. As noted above, Mr. Gatien has not pled any ties between California and this
13 controversy, and it is clear that Massachusetts and specifically Boston has almost all ties
14 to the disputes asserted in the Complaint. To the extent that Mr. Gatien or others located
15 outside Massachusetts and California possess relevant evidence, this also does not favor
16 Mr. Gatien's choice of a foreign forum in California, and this factor must be said to favor
17 transfer. *See also Carolina Cas. Co. v. Data Broad Corp.*, 158 F.Supp.2d 1044, (N.D.
18 Cal. 2001) ("the degree to which courts defer to the plaintiff's chosen venue is
19 substantially reduced when the plaintiff's venue choice is not its residence or where the
20 forum lacks a significant connection to the activities alleged in the complaint.") (internal
21 citation omitted).

22 Based on the analysis in the *Rubio v. Monsanto Co.* case, and because it is clear that
23 Massachusetts has significant ties to this case and California has none, this factor favors
24 transfer of venue to the District of Massachusetts.

25
26 4. The respective parties' contacts with the forum

27 Plaintiff Gatien has not alleged in the Complaint that he has any contacts with his
28 chosen forum, much less contacts that are relevant to this Massachusetts-based dispute. It

1 appears that Mr. Gatien's only contact with the forum is that his counsel is based in Los
2 Angeles. While the Hotel Defendants have business in this forum, that business is not
3 related to this dispute, and there is no allegation in the Complaint that any California
4 business of the Hotel Defendants is specifically related to this controversy.

5 This factor favors transfer of the case to the District of Massachusetts.

6
7 5. The contacts relating to the plaintiff's cause of action in the chosen forum

8 As noted above, the Complaint is devoid of allegations that any activity relevant to
9 the controversy occurred in California or had any effect in California. The Complaint
10 could not credibly have alleged any impact of the infringement in California, when the
11 only plaintiff is an individual residing in New York City. The contacts between
12 Massachusetts and the dispute are strong and undeniable, while there are no contacts
13 between California and the dispute. *See e.g. FTC v. Watson Pharms., Inc.*, 611 F.Supp.2d
14 1081, 1088-89 (C.D. Cal. 2009) (applying *Jones v. GNC Franchising* factors and deciding
15 that where antitrust enforcement action by State of California arose out of settlement of
16 patent suits in the Northern District of Georgia, contacts between Georgia and dispute
17 outweighed contacts between California and dispute).

18 This factor favors transfer of venue to Massachusetts.

19
20 6. The differences in the costs of litigation in the two forums

21 The Complaint strongly suggests and the Hunter Declaration confirms that all of the
22 key witnesses are likely to be in Massachusetts or much closer to Massachusetts than to
23 California. The Boston Tunnel nightclub owner and operator is in Boston. Hunter Decl.
24 ¶3. The witnesses associated with the W Boston Hotel are in Boston. Hunter Decl. ¶2, 6.
25 The people most knowledgeable about the lease between the hotel and the Boston Tunnel
26 nightclub are in Boston and Maryland. Hunter Decl. ¶7. Plaintiff Gatien is a resident of
27 New York City, relies on his former operation of the Original Tunnel nightclub in New
28 York to form part of the basis of the rights that he claims and asserts in the Complaint,

1 and the evidence about the Original Tunnel nightclub is most likely in New York City.
2 Complaint, DN 1, ¶11. Because all of the key witnesses are either in Massachusetts or on
3 the East Coast, the cost of trial attendance will likely be less in Massachusetts than in
4 California.

5 This factor strongly favors transfer of venue to the District of Massachusetts.

6
7 7. The availability of compulsory process to compel attendance of unwilling
8 non-party witnesses

9 Plaintiff Gaten dismissed Speakeasy Hospitality Group, LLC from this case after
10 clearly identifying the Boston Tunnel nightclub owner and operator as the central figure in
11 this dispute. Although the true tenant entity under the nightclub lease is St Entertainment
12 Group, Inc. and not the apparently wrongly-named Speakeasy Hospitality Group LLC,
13 Hunter Decl. ¶3, clearly the nightclub owner and operator is essential to this case. St
14 Entertainment Group, Inc. and its principal, Brian Lesser, are based in Boston and Mr.
15 Lesser is believed to reside in the Boston area. Hunter Decl. ¶3. Mr. Lesser is believed to
16 be the single most knowledgeable person about the selection, promotion and use of the
17 Tunnel name/trademark and the Logo that is central to the allegations of the Complaint.
18 Hunter Decl. ¶3. As non-parties to the dispute, Mr. Lesser and others who may be
19 employed by or supervise the operations of the Boston Tunnel nightclub are beyond the
20 trial subpoena power of the Central District of California but within the trial subpoena
21 power of the District of Massachusetts.

22 This factor strongly favors transfer of venue to Massachusetts.

23
24 8. The ease of access to sources of proof

25 To the extent that other non-parties knowledgeable about the Boston Tunnel
26 nightclub operations or familiar with other facts that bear on liability or damages possess
27 evidence that is necessary or useful to resolve this dispute, those witnesses are also likely
28 to be located in the Boston area, and certainly not in California. Hunter Decl. ¶8. As the

1 General Manager of the W Boston Hotel, Mr. Singh will have relevant evidence about use
2 or non-use of the alleged intellectual property by the Hotel Defendants, the alleged
3 benefits to the Hotel Defendants of using the intellectual property, and the damages or
4 lack of damages accruing from such use. Hunter Decl. ¶6. In addition to Mr. Singh, the
5 W Boston Hotel Director of Finance, Rob Hunter, will also provide evidence relevant to
6 the lack of any profits made by the Hotel Defendants from the alleged use of the
7 intellectual property and the damages or lack of damages from the alleged infringement.
8 Hunter Decl. ¶2. Both Mr. Singh and Mr. Hunter live in the Boston area. Hunter Decl.
9 ¶2, 6. Another non-party to this lawsuit, Kari Olsen, is likely to be the most
10 knowledgeable person about the negotiation and performance of the lease under which St
11 Entertainment operates the Boston Tunnel. Ms. Olsen lives in Maryland, which is much
12 closer to Boston than to California, and is in the same time zone as Boston. Hunter Decl.
13 ¶7.

14 This factor strongly favors transfer, and is often considered one of if not the most
15 important factors in a transfer of venue decision.

16
17 9. The presence of a forum selection clause in the contract of the parties

18 As noted above, there is no contract between Plaintiff Gatien and the Hotel
19 Defendants, therefore no agreed forum selection clause is implicated in the decision
20 whether or not to transfer venue.

21
22 10. The relevant public policy of the forum state, if any, concerning the dispute

23 Unlike the *Jones v. GNC Franchising* case, there are no specific California public
24 policy issues that support the retention of this case in California courts. The *Jones v.*
25 *GNC Franchising* found such a public policy in a state statute protecting franchisees
26 against the unequal bargaining power between franchisors and franchisees, and found that
27 strong public policy concern outweighed the forum selection clause that mandated that all
28 lawsuits concerning the franchise agreement and relationship should be heard in the

1 franchisor's home judicial district in Pennsylvania. The court thus upheld the California
2 franchisee's choice of forum in its home district in California. 211 F.3d at 497-498.

3 The Complaint in this case does not allege any facts that would support a finding of
4 any particular California public policy concerns here. Plaintiff Gatien is not a citizen or
5 resident of California, none of the conduct underpinning the Complaint occurred in
6 California, and none of the alleged damage or harm was directed at or affected California
7 residents.

8 This factor is thus either neutral or favors transfer of venue to Massachusetts, which
9 does have an interest in addressing conduct occurring within the state and the alleged
10 harm arising from that conduct.

11 VI. CONCLUSION

12 The *Jones v. NC Franchising* factors strongly favor transfer of this case to the
13 District of Massachusetts. At least factors 6, 7 and 8 strongly favor transfer, factors 3, 4
14 and 5 favor transfer, and factors 1, 2, 9 and 10 either slightly favor transfer or are neutral
15 to the analysis. For all of the reasons stated above, 28 U.S.C. §1404(a) provides this
16 Court with the power and discretion to transfer this case to the District of Massachusetts
17 where the substantial events giving rise to this dispute arose, where the key non-party
18 witnesses are subject to the trial subpoena power of the Court, where the action can be
19 most conveniently conducted for the witnesses who will be testifying and those who are
20 most likely to testify, and where the action can be conducted at a lower cost to the parties
21 than to litigate this matter in California. The Hotel Defendants therefore respectfully
22 request this Court to exercise its discretion and authority to transfer venue of this action to
23 the District of Massachusetts.

24 Dated: July 10, 2017

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 West Seventh Street, 29th Floor, Los Angeles, California 90017-2547.

On July 10, 2017, I electronically filed the following document with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all other parties appearing on the docket sheet:

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO TRANSFER VENUE TO THE DISTRICT OF
MASSACHUSETTS PURSUANT TO 28 U.S.C. § 1404(a)**

☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on July 10, 2017 at Los Angeles, California

/s/ Martha Aguilar
MARTHA AGUILAR
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